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DEPARTMENT OF DEFENSE

Defense Acquisition Regulations System

48 CFR Parts 211 and 225

RIN 0750-AH22

Defense Federal Acquisition Regulation Supplement: Fire-Resistant Fiber for Production of Military Uniforms (DFARS Case 2011-D021)

AGENCY: Defense Acquisition Regulations System, Department of Defense (DoD).

ACTION: Final rule.

SUMMARY: DoD is adopting as final, with changes, an interim rule amending the Defense Federal Acquisition Regulation Supplement (DFARS) to implement the section of the National Defense Authorization Act for Fiscal Year 2011 that prohibits specification of the use of fire-resistant rayon fiber in solicitations issued before January 1, 2015.

DATES: Effective Date: [Insert date of publication in the FEDERAL REGISTER.]

FOR FURTHER INFORMATION CONTACT: Ms. Amy G. Williams, telephone 703-602-0328.

SUPPLEMENTARY INFORMATION:

I. Background

DoD published an interim rule in the Federal Register at 76 FR 32843 on June 6, 2011, to implement section 821 of the National Defense Authorization Act for Fiscal Year 2011. Section 821 prohibits specification of the use of fire-resistant rayon fiber in solicitations issued before January 1, 2015.

Ten respondents submitted public comments in response to the interim rule. Nine of the respondents (manufacturers, suppliers, or distributors of fire-resistant fibers, yarns, fabrics, or military uniforms) submitted comments that were essentially the same.

II. Discussion and Analysis of the Public Comments

DoD reviewed the public comments in the development of the final rule. A discussion of the comments and the changes made to the rule as a result of those comments are provided as follows:

A. Implements law as written

Comment: One respondent stated that the DFARS interim rule implements the statute as written.

Response: Noted.

B. Selection of fire-resistant rayon fiber

Comment: Nine respondents stated that the law only requires that DoD solicitations prior to January 1, 2015, not specify the use of fire-resistant rayon fiber. The law does not

restrict DoD's selection and use of fabrics containing fire-resistant rayon fiber. The respondents recommended that the DFARS final rule make clear that the rule does not prohibit DoD from selecting fabrics that include fire-resistant rayon fibers.

Response: These responses have correctly stated the requirements of the law. The DFARS interim rule correctly reflected the statute. However, DoD has added clarification to the title and text of section 225.7016, that it is the requirement that is prohibited, not the voluntary offer and use.

C. Specification of other fire-resistant fibers

Comment: Nine respondents stated that the law is narrow in its application only to fire-resistant rayon fibers. According to the respondents, the law does not address DoD's ability to specify inherently flame-resistant cellulosic fibers; this broader category includes any manmade cellulosic fiber that has fire resistance added to its slurry before fiber extrusion, such as acetate, rayon, lyocell, etc.. The respondents recommended that the DFARS final rule make it clear that the prohibition applies only to DoD's ability to specify the use of fire-resistant rayon fibers, and not to any other categories of fibers.

Response: The DoD interim rule clearly reflected the statutory prohibition on requiring the use of fire-resistant rayon fiber in a specification. However, it would be contrary

to the intent of the statute to state the requirements of the solicitation in such a way as to exclude categories of fire-resistant fiber (such as polymers) from consideration.

D. Specification of branded products

Comment: Eight respondents stated that the law does not restrict the specification of branded products. The respondents recommended that the DFARS rule not include any mention of branded commercial products.

Response: The interim DFARS rule did not make any mention of branded commercial products. However, if a solicitation specifies the use of a branded commercial product that contains fire-resistant rayon fibers, then it would be in violation of the prohibition not to specify the use of fire-resistant rayon fiber.

E. Domestic Nonavailability Determinations (DNADs) or waivers

Comment: Nine respondents recommended that the DFARS rule should make clear that it does not prohibit DoD's ability to source foreign fibers under its DNAD authority or a legislated waiver to the Berry Amendment.

Response: There is nothing in the interim or final rule that would, in any way, affect DoD's ability to source foreign fibers under its DNAD authority or a legislated waiver to the Berry Amendment.

F. Inequity in the treatment of foreign fibers

Comment: Nine respondents stated that the law produces inequity in the treatment of foreign fibers that are specified by DoD and are purchased under DoD's authority to waive the Berry Amendment. The respondents cited various foreign fibers, none of which are "restricted for specification."

Response: Noted. However, the DFARS rule must implement the statute as enacted.

G. Impact on small business

Comment: Nine respondents disagreed with the statement in the initial regulatory flexibility analysis that the impact on small businesses will be minimal. The respondents cited two points on which they disagree with the analysis:

1. According to the respondents, Nomex is not a substitute for fire-resistant rayon fiber for the manufacture of all types of military uniforms. The respondents stated that Nomex is widely used in flight suits, but not in ground troop uniforms, unless used with cotton. Cotton requires topical fire resistant treatment, which is not permanent for the life of the fiber. According to the respondents, the alternatives to the use of fire-resistant rayon are "next best" as a permanent fire-resistant solution in hot and humid environments and are also more expensive.

2. Dozens of small businesses currently supply DoD with uniforms made using fire-resistant rayon fibers. The impact on small business can be significant if designing new products and producing existing programs becomes restrained by availability of raw materials.

Response: Although small businesses may be involved in providing military uniforms using fire-resistant rayon fibers, there is nothing in this rule that prohibits the use of fire-resistant rayon fibers. If fire-resistant rayon is as superior to the alternative fire-resistant fibers as stated by the respondents, then competition from alternative fibers should have little impact on small business because there will likely be small businesses engaged in the manufacture of the military uniforms containing an alternative fiber. Furthermore, there is nothing in this final rule that would restrain the availability of raw materials. See also section V of this Federal Register notice.

H. End of statutory restriction

Comment: One respondent expressed concern over what will happen when the statutory restriction ends in January 2015. The respondent requested a dialog regarding extension of this date, as the date does not seem relevant to the ability of the military textile industrial base to meet DoD demand for flame-resistant protective apparel products. Furthermore, the

respondent noted that performance-based specifications are already required to the maximum extent possible pursuant to FAR section 11.002(a)(2)(i)(A)-(B).

Response: This comment is outside the scope of this case, which is for the purpose of implementing the existing statute.

I. Continued collaboration

Comment: All respondents recommended continued collaboration with DoD. One respondent stated that DoD should continue to pursue strategies to create continuous collaboration between industry and the acquiring service/agencies. According to the respondent, DoD should also ensure that all expertise available within the Program Executive Office, as well as the RDT&E commands, is incorporated into the drafting of purchase descriptions to avoid over reliance on industry partners for the drafting of purchase descriptions. The other respondents stated that clarifying and simplifying the DFARS rule will result in greater collaboration and investment on behalf of the needs of the U.S. military.

Response: Noted.

III. Other changes

Comment: One DoD respondent recommended that the coverage should be moved from part 225 (Foreign Acquisition) to part 211 (Describing Agency Needs).

Response: Because of the implication of the rule for foreign acquisition and the inter-relationship with the Berry Amendment and the DNAD and statutory waiver authority for rayon fiber, DoD has decided to retain the coverage in part 225. However, a cross reference has been added in part 211.

IV. Executive Orders 12866 and 13563

Executive Orders (E.O.s) 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). E.O. 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This is not a significant regulatory action and, therefore, was not subject to review under section 6(b) of E.O. 12866, Regulatory Planning and Review, dated September 30, 1993. This rule is not a major rule under 5 U.S.C. 804.

V. Regulatory Flexibility Act

A final regulatory flexibility analysis has been prepared consistent with the Regulatory Flexibility Act, 5 U.S.C. 601, et seq., and is summarized as follows:

The need for this rule is to implement section 821 of the

National Defense Authorization Act for Fiscal Year 2011 (Pub. L. 111-383). Section 821 prohibits specification of the use of fire-resistant rayon fiber in solicitations issued before January 1, 2015.

The objectives of this rule are to prohibit specification of the use of fire-resistant rayon fiber in solicitations issued before January 1, 2015, as required by the statute. This will provide opportunity for offerors to propose alternative solutions to meet DoD requirements.

The legal basis for this rule is section 821 of the National Defense Authorization Act for Fiscal Year 2011 (Pub. L. 111-383).

Nine respondents disagreed with the statement in the initial regulatory flexibility analysis that the impact on small businesses will be minimal. The respondents cited two points on which they disagree with the analysis:

According to the respondents, Nomex is not a substitute for fire-resistant rayon fiber for the manufacture of all types of military uniforms. The respondents stated that Nomex is widely used in flight suits, but not in ground troop uniforms, unless used with cotton. Cotton requires topical fire resistant treatment, which is not permanent for the life of the fiber. According to the respondents, the alternatives to the use of fire-resistant rayon are "next best" as a permanent fire-

resistant solution in hot and humid environments and are also more expensive.

The respondents stated further that dozens of small businesses currently supply DoD with uniforms made using fire-resistant rayon fibers. The impact on small business can be significant if designing new products and producing existing programs becomes restrained by availability of raw materials.

Although small businesses may be involved in providing military uniforms using fire-resistant rayon fibers, there is nothing in this rule that prohibits the use of fire-resistant rayon fibers. If fire-resistant rayon is as superior to the alternative fire-resistant fibers as stated by the respondents, then competition from alternative fibers should have little impact on small business because there will likely be small businesses engaged in the manufacture of the military uniforms containing an alternative fiber. Furthermore, there is nothing in this final rule that would restrain the availability of raw materials.

The two major sources of fire-resistant fiber used in DoD products either come from DuPont (product called Nomex) or The Lenzing Group, Austria (product called Fire Resistant Rayon). In order to manufacture a fire-resistant uniform currently being sourced by the services, three products are blended together to meet desired cost, availability, and performance criteria:

- Nylon.
- Para-aramid (Kevlar by DuPont or Twaron by Teijin (The Netherlands)).
- Either Nomex (DuPont) or Fire Resistant Rayon (Lenzing).

DuPont is a domestic large business and the other manufacturers of fire-resistant fiber are foreign. However, small businesses are involved in the supply of the military uniforms that utilize the foreign fire-resistant rayon.

There were no comments filed by the Chief Counsel for Advocacy of the Small Business Administration in response to the rule.

There are no reporting or recordkeeping requirements.

The requirements of the rule are the minimum requirements necessary to meet the requirements of the statute. Although small businesses are involved in manufacture of the uniforms, there is nothing in this rule that prohibits the continued acquisition of military uniforms containing fire-resistant rayon fiber or that would hinder acquisition of that fire-resistant fiber from Austria. Further, if another type of fire-resistant fiber is competitively selected (such as Nomex from DuPont), there will probably still be small businesses engaged in the manufacture of the military uniforms containing that fiber.

VI. Paperwork Reduction Act

The rule does not contain any information collection requirements that require the approval of the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. chapter 35).

List of Subjects in 48 CFR Parts 211 and 225

Government procurement.

Ynette R. Shelkin

Editor, Defense Acquisition Regulations System.

Accordingly, the interim rule amending 48 CFR parts 211 and 225, which was published at 76 FR 32843 on June 6, 2011, is adopted as a final rule with the following changes:

1. The authority citation for 48 CFR parts 211 and 225 continues to read as follows:

Authority: 41 U.S.C. 1303 and 48 CFR chapter 1.

PART 211—DESCRIBING AGENCY NEEDS

2. Add section 211.170 to read as follows:

211.170 Requiring the use of fire-resistant rayon fiber.

See 225.7016 for the statutory prohibition on requiring the use of fire-resistant rayon fiber.

PART 225—FOREIGN ACQUISITION

3. Revise section 225.7016 to read as follows:

225.7016 Prohibition on requiring the use of fire-resistant rayon fiber.

In accordance with section 821 of the National Defense Authorization Act for Fiscal Year 2011, do not include in any solicitation issued before January 1, 2015, a requirement that proposals submitted pursuant to such solicitation shall include the use of fire-resistant rayon fiber. However, this does not preclude issuing a solicitation that allows offerors to propose the use of fire-resistant rayon fiber.

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